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THE KU KLUX KLAN ACT AND THE CIVIL RIGHTS REVOLUTION: HOW CIVIL RIGHTS LITIGATION CAME TO REGULATE POLICE AND CORRECTIONAL OFFICER MISCONDUCT

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"Police misconduct—whether described as brutality, harassment, verbal abuse or discourtesy—cannot be tolerated even if it is infrequent. It contributes directly to the risk of civil disorder. It is inconsistent with the basic responsibility and function of a police force in a democracy."[1]

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country."[2]

I. INTRODUCTION

Section 1983 of Title 42 of the United States Code (originally, and more colorfully, known as Section One of the Ku Klux Klan Act,[3] and also known as the Civil Rights Act of 1871) is the workhorse of modern civil rights litigation.[4] No other part of the United States Code has spawned as much litigation; no other statute has had a more profound impact on citizens' relationship with government; no other law is more central to present day police and correctional officer accountability. Yet for its first 90 years, this remarkable piece of legislation remained virtually unknown and unused[5]—a little known or understood relict of the

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1. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION OF CIVIL DISORDERS 160 (1968) [hereinafter The Kerner Commission]. The reports were created in response to Executive Order 11365, which established a National Advisory Commission of Civil Disorders, also popularly known as "The Kerner Commission." *Id.* at 19-23.

2. Winston Churchill, *quoted in* LYNN S. BRANHAM & SHELDON KRANTZ, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS (1996).

3. Act of April 20, 1871, ch. 22, 17 Stat. 13. Three years later, it became § 1979 of the Revised Statutes of the United States. Rev. Stat. § 1979 (1874).

4. Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000). The Act provides:

> Every person who, under *color of any statute*, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or *causes* to be subjected, any citizen of the United States or other *person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id. (emphasis added).

5. There were the odd and unusual references to the statute, such as in *Carter v. Greenhow*, 114 U.S. 317, 321-23 (1885), but these decisions were generally inconsequential in comparison with the later decisions following *Monroe v. Pape*, 365 U.S. 167 (1961).

Compromise of 1877 ending reconstruction.[6] It, however, was not written in a vacuum. Its purpose, in part, was to effectuate broad constitutional protections set in place in the aftermath of the Civil War. These protections did not remain static, so the history of the Act is intertwined with a continuing history of expanding rights.

To generalize, perhaps over broadly, § 1983 provides a remedy to any person whose federally protected rights have been abridged by any other person acting under the color of state law or custom.[7] Thus, the rights protected by this Act change with changing notions of what constitutes a constitutional or federally protected right as well as changing notions of what the appropriate remedy might be. Therefore, the history of this act follows two strains.

First, there is the problem of figuring out just what the legislators in 1871 meant to do when they passed Section One of the Ku Klux Klan Act. While historical insight remains elusive, contingent, and subject to revision, still, one cannot properly apply, in the present, a law rooted in history, unless one understands (at least in some sense) what was originally intended. This is not an argument for a rigid version of that puzzling doctrine, "original intent." Rather, it is premised upon the understanding that one must have some sense of the past in order to have any sense of where to begin in the present.

Second, the rapid expansion of constitutionally protected rights as applied to the states in the twentieth century radically changed § 1983's scope of action.[8] Both strands must be understood to gain an appreciation for how this act works in modern America.

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6. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492 - PRESENT 205-210 (Harper Collins 1999) (1980).

7. *See generally* Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658 (1978).

8. The first Supreme Court case incorporating a part of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment did not come until 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925), which held that the First Amendment guarantees are a fundamental element of liberty protected by the Fourteenth Amendment. That the doctrine of incorporation proved as controversial and difficult to implement may seem peculiar in light of apparent Congressional intentions during Reconstruction. As historian Eric Foner writes, "[T]he doctrine of 'incorporation'—that the states were now required not to violate the Bill of Rights—had by 1874 become a virtually noncontroversial minimum Congressional interpretation of the Amendment's purposes." ERIC FONER, RECONSTRUCTION 533 (1988). Judges of the era, however, "could not bring themselves to declare that the Reconstruction amendments had fundamentally altered the nature of the Union." Lou Falkner Williams, *The South Carolina Ku Klux Klan Trials and Enforcement of Federal Rights, 1871- 1872*, 39 CIVIL WAR HISTORY 47, 47 (1993). Thus, "confusion remained on the incorporation issue." *Id.*; *see also* Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 945 (1984) (detailing how the Circuit Court Judges rejected the prosecution's "theory of incorporation of the fourth amendment into the fourteenth").

II. ORIGINS OF THE KU KLUX KLAN ACT

The year 1865 was, to say the least, a tumultuous year. General Robert E. Lee surrendered the Army of Northern Virginia at Appomattox ending the Nation's bloodiest conflict,[9] John Wilkes Booth assassinated President Lincoln, and Congress passed the Thirteenth Amendment to the Constitution freeing the former slaves. In 1866, Congress passed its first civil rights act,[10] and in 1868 Congress passed the Fourteenth Amendment, which, among other things, made citizens of the newly freed slaves and required the states to provide each new citizen due process and equal protection of the laws.[11] This, among other things, overruled the infamous *Dred Scott* decision, which had held that free Black persons were inherently inferior to whites, and thus could not be citizens.[12] The Fifteenth Amendment, enacted in 1870, gave Black males the right to vote.[13] These constitutional protections were originally intended to benefit the newly freed slaves but they were written in broad language that would ultimately benefit everyone.

Radical Republicans (who, with reason, were suspicious of, and hostile to, the state governments in the former Confederacy) controlled Congress in the immediate post-Civil War era.[14] Former Confederate General Nathaniel Bedford Forest led the Ku Klux Klan and then, when its violence became too much even for him, attempted unsuccessfully to disband it.[15] The Ku Klux Klan, and other groups, such as the Knights of

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9. According to C. Vann Woodward, "American lives lost in the Civil War exceed the total of those lost in all the other wars the country has fought added together, world wars included." C. Vann Woodward, *Editor's Introduction*, to JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM xvii-xix (C. Vann Woodward, ed. 1988).

10. Act of April 9, 1886, ch. 31, 14 Stat. 27. This Act was in part a precursor to the equal protection clause; it made certain kinds of discrimination criminal and provided federal jurisdiction where local state courts were unavailable. *Id.* The Supreme Court narrowed and arguably gutted this last part by holding it inapplicable to criminal prosecutions of White persons whose victims were Black. *See, e.g.*, Blyew v. United States, 80 U.S. (13 Wall.) 581 (1871) (holding that a federal court could not usurp jurisdiction simply because the State of Kentucky would not permit two African-American witnesses to testify about the murder of several African-Americans by two white males).

11. U.S. CONST. amend. XIV.

12. Scott v. Sandford, 60 U.S. 393 (1856). The *Dred Scott* decision has been called "one of the Court's great failures of nerve." *Hearings before the Senate Judiciary Comm.*, 102d Cong., 1st Sess. 312 (1991) (testimony of Chief Judge Oakes).

13. U.S. CONST. amend. XV.

14. *See* John E. Lee, Note, 30 SUFFOLK U. L. REV. 153, 155-57 (1996) (describing motives of Radical Republicans and subsequent acts of violence by the Ku Klux Klan).

15. Benjamin Quarles writes, "In 1869 the head of the Klan, Nathan B. Forrest, alarmed at the recklessness of some of the local dens, ordered the organization dissolved, but his edict was ignored." BENJAMIN QUARLES, THE NEGRO IN THE MAKING OF AMERICA 139 (1964).

the White Camelia and white-citizens councils, often acting under color of state law, and often with the complicity of state and local government, terrorized[16] and murdered,[17] with impunity, the newly freed slaves and any who supported them.[18]

The problem for Congress was how to make the new rights effective. Congress intended the Civil Rights Act of 1871, a part of which has come down to us as 42 U.S.C. § 1983, to be a significant part of the solution. In its current form, it provides federal court jurisdiction for any citizen whose rights were abridged by any person acting under the color of state law.[19] This includes law enforcement officers, and anyone temporarily deputized by them, or otherwise acting as an agent for state or local governments.[20]

The original Ku Klux Klan Act of 1871 was much broader than the remnants that we see today in 42 U.S.C. §§ 1983, 1985 and 1986.[21] It included broad criminal penalties for various conspiracies by private persons to abridge other citizens' rights. Among other things, it criminalized conspiracies to hinder people in the exercise of the right to vote, and

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16. Eric Foner writes, "In some areas, violence against blacks reached staggering proportions . . . 'they govern . . . by the pistol and the rifle.' 'I saw white men whipping colored men just the same as they did before the war.'" FONER, *supra* note 8, at 119 (citations omitted).

17. "In 1866, after 'some kind of dispute with some freedmen,' a group near Pine Bluff, Arkansas, set fire to a black settlement and rounded up the inhabitants. A man who visited the scene the following morning found 'a sight that apald [sic] me 24 Negro men woman and children [sic] were hanging to trees all round the Cabbins.'" *Id.* at 119.

18. "John Wesley North, a Northerner . . . in 1866 encountered a mob beating a freedman. When North intervened, the crowd dispersed, 'evidently amazed that any person should venture to remonstrate against even the murder of a black man.' A local vender subsequently offered the Yankee this advice: 'never in this country . . . interfere in behalf of a nigger.'" *Id.* at 121.

19. 42 U.S.C. § 1983 (2000).

20. *See* Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 928-32 (1982) (describing standards for "under color of law").

21. 42 U.S.C. §§ 1985 and 1986 are the civil conspiracy analogues to 42 U.S.C. § 1983, and provide a civil remedy for certain civil rights violations. *Compare* Civil Rights Act of 1871, 42 U.S.C. § 1983, *with* 42 U.S.C. § 1985, *and* 42 U.S.C. § 1986. Actions under these statutes are much less common. In many cases, the difficulty in proving class or race-based animus is too high a threshold to meet. *See, e.g.*, Bass v. Robinson, 167 F.3d 1041 (6th Cir. 1999) (failing to allege that police use of excessive force was motivated by race or other class based animus). In other cases, where the racism of at least one person may be plausible, the evidence fails to establish a conspiracy—an agreement or meeting of the minds to violate a claimant's constitutional rights. *See, e.g.*, Simmons v. Poe, 47 F.3d 1370 (4th Cir. 1995) (failing to prove that law enforcement officials conspired to deprive the accused of equal protection of the law as required under 42 U.S.C. §1985). This often proves to be an insurmountable hurdle.

conspiracies to deny equal protection of the laws.[22] Effective implementation depended on a broad interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments, in unreceptive nineteenth-century courts.

The first major test of Reconstruction civil rights legislation came in the South Carolina Ku Klux Klan trials of 1871 to 1872.[23] There, the lower Circuit Court frustrated the prosecution's attempt to forge broad constitutionally based rights and the Supreme Court ducked the important constitutional issues.[24] Finally, in 1882 the Supreme Court effectively gutted the criminal conspiracy portions of this Act by holding that the Fourteenth Amendment applied solely to state action and did not encompass acts by private individuals.[25] While the Supreme Court's restrictive interpretation of the Reconstruction era's constitutional and legislative initiatives may seem harsh and insensitive to the modern sensibility, "[t]o its contemporaries . . . the Court appeared as a prime instrument of the conciliation needed to signal the end of Reconstruction and a desired return to 'normalcy.'"[26] More importantly, the civil remedies portion of this statute now found in 42 U.S.C. § 1983 remained, albeit as we will see shaped and constricted by this restrictive notion of state action under the Due Process Clause.

The end of reconstruction, restrictive judicial interpretations, and the "revolt of the red necks,"[27] temporarily retired this statute.[28] Little was heard of this legislation during the era of Jim Crow. The Civil Rights movement resurrected it; it remains the foremost of all of the civil rights statutes spawning thousands of cases. It is the vehicle by which any citizen can sue most, but not all,[29] representatives of state and local govern-

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22. Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871).

23. Hall, *supra* note 8, at 947-48.

24. *Id.*

25. United States v. Harris, 106 U.S. 629, 638-40 (1882).

26. BERNARD SWARTZ, A HISTORY OF THE SUPREME COURT 170 (1993).

27. A. KIRWIN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS 1876-1925 (1951).

28. A Lexis-Nexis search of 17 Stat.13 from 1871 to 1960 disclosed 16 United States Supreme Court cases, and a similar search of 1979 Rev. Stat. revealed 7 cases. A search of 42 U.S.C. § 1983 from 1960 to present yields 585 Supreme Court citations alone, and lower court opinions run in the thousands.

29. Only a relatively few, highly placed, officials are immune from suit and therefore not subject to this statute. The Supreme Court in a variety of cases provided absolute immunity to federal judges, Bradley v. Fisher, 80 U.S. 335 (1871) (granting absolute immunity in a civil liability suit brought against a judge for order of disbarment as a result of the criminal trial of John H. Suratt, who was implicated in the assassination of Abraham Lincoln), state judges, Pierson v. Ray, 386 U.S. 547, 553-54 (1967), prosecutors, Imbler v. Pachtman, 424 U.S. 409 (1976), federal hearing examiners and administrative law judges, Butz v. Economou, 438 U.S. 478, 514 (1978), attorneys prosecuting administrative proceedings, *id.*, the President, Nixon v. Fitzgerald, 438 U.S. 731 (1981), witnesses (including police officers) who testify in judicial proceedings, *Butz*, 438 U.S. at 512, grand jurors, *Imbler*, 424

ments (including law enforcement and corrections officers) for misconduct.

One must distinguish state law enforcement officers from federal law enforcement officers. Although a suit against an FBI agent, for example, is almost identical to a suit against a local law enforcement officer, the roots of the two suits are conceptually different. Federal law enforcement officers, unlike their state counterparts, are not covered by § 1983.[30] However, the Supreme Court in *Bivens v. Six Unknown Named Agents* provided a remedy for the misconduct of federal officials,[31] which is virtually identical in scope with a § 1983 action.[32] Thus, except for the uniform worn, all law enforcement agents have similar liability, and similar rules and defenses govern their conduct. For many purposes, we can speak of § 1983 actions and *Bivens* actions as if they were the same thing. While they have different origins, it is not ordinarily harmful to lump the two conceptually.

A *Bivens* action is similar in scope with a § 1983[33] action while liability under the Federal Tort Claims Act is "coterminous" with liability under *Bivens*.[34] Thus, many of the concepts that were originally developed in § 1983 litigation apply broadly to the entire field of official misconduct. All law enforcement and corrections officers—state and federal—confront similar issues of liability. Thus, the history of the Ku Klux Klan Act is relevant to understanding these other areas.

III. THE CRIMINAL JUSTICE REVOLUTION IN THE TWENTIETH CENTURY: FEDERALIZING POLICE AND CORRECTIONAL OFFICERS' LIABILITY

Federal liability for local governmental wrongdoing revolutionized policing and corrections. Before the 1960's, state and local officials were effectively immune from liability for even the worst misconduct. Subject

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U.S. at 423, and legislators, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). In each case, the absolute immunity attaches if, and only if, the individual is acting in his or her official capacity. Because these officials are not subject to suit (other than for injunctive relief and attorney's fees, Hutto v. Finney, 437 U.S. 678 (1978)) under this civil rights statute, they are not dealt with further.

30. 42 U.S.C. § 1983.

31. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389-392 (1971) (establishing that a federal officer's unconstitutional conduct can result in a cause of action for damages).

32. *Id.* at 389, 395-397 (comparing this newly judicially created claim to equivalent § 1983 claims).

33. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 22 (1979) (stating that punitive damages may be had in a *Bivens* suit or in a § 1983 action); Cleavinger v. Saxner, 474 U.S. 193, 199-201 (1985) (indicating that qualified immunity rules are the same in both types of actions).

34. Norton v. U.S., 581 F.2d 390, 393 (4th Cir. 1978).

only to regulation by the individual states, flagrant brutality and other misconduct by both police and corrections officials were often ignored.[35] Lack of effective channels for redress were particularly troublesome for minorities whose "feelings about hostile police conduct may even be exceeded by the conviction that ghetto neighborhoods are not given adequate police protection."[36] Historically, courts found that prisoners had no rights,[37] and therefore no access to the courts.[38] Thus, despite abuses, victims of police and correctional officers' misconduct rarely found a remedy in this Nation's courts. The 1961 Supreme Court decision in *Monroe v. Pape*[39] changed the landscape; federal liability, enforceable in a federal court, broadened accountability of state and local officials.[40]

This federal liability, for what had heretofore concerned only state law is, in part,[41] a consequence of the application of federal constitutional law to state criminal procedure and to state jails and prisons. Such familiar protections as the freedom of speech, the right against self-incrimination, freedom from unreasonable searches and seizures, and cruel and unusual punishments did not originally apply to the states.[42] States were free to ignore the Bill of Rights. Even where those same rights were found in a state's constitution, application was often lukewarm. State courts generally afforded fewer protections against governmental abuse than did their federal counterparts.[43] This created the anomalous situation where state

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35. *See, e.g.*, Screws v. United States, 325 U.S. 91, 92-93 (1945) (describing how police, after arresting defendant, beat him into unconsciousness for some thirty minutes).

36. The Kerner Commission, *supra* note 1, at 161.

37. *See, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790 (1871) (holding that the Circuit court of Richmond did not err in refusing to remand the trial of the accused to the county where the crime was committed, or in failing to select jurors from said county).

38. *See Ex parte* Hull, 312 U.S. 546, 548-49 (1941) (demonstrating that prisons created regulations to impede prisoners' access to the courts). A constitutional right of access to the courts was established in 1941. *Id.* at 549-52.

39. Monroe v. Pape, 365 U.S. 167 (1961).

40. *Id.* at 191-92.

41. No one would argue that the gradual incorporation of the many guarantees found in the Bill of Rights into the Fourteenth Amendment by itself was responsible for this change. Many other factors beyond the scope of this article came together to make this change possible. *See generally* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE (1998) (discussing the various factors prominent in the prison reform litigation cases).

42. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that rights granted by the first eight amendments did not apply to the states because they were not privileges or immunities guaranteed by the Fourteenth Amendment).

43. *See* Wolf v. Colorado, 338 U.S. 25 (1949) (holding that the exclusionary rule did not apply to the states). At that time, 31 states rejected the exclusionary rule. *Id.* at 29. Thus, the rule applied only to federal law enforcement agencies in those 31 states that rejected the rule. *See id.*

officials could oppress their citizens in ways prohibited to the federal government.

The most influential citizens, at the Nation's founding, feared a dominant federal government and believed that the states would "preserve the rights of individuals."[44] Thus, much of the argument favoring inclusion of a bill of rights in the U.S. Constitution revolved around the need to constrain a powerful federal government. It did not appear to be prudent to burden the individual states, which were seen as guarantors of individual liberties.

Lest this seem naive, one must recall that many of the landed gentry, who created the U.S. Constitution, were powerful political forces in their own states. The possibility that they could be tyrannized by state governments that they often controlled must have seemed remote. Oppression of indigenous peoples, slaves, women, and other non-voters (which included anyone who did not own property)[45] was a lesser concern, although the compromises generated by slavery caused many politicians in the North and Upper-South considerable discomfiture.[46] Moreover, many of the states adopted bills of rights in their own constitutions before the federal government. State governments surely seemed less threatening than a potentially all-powerful federal government.

Later events, particularly after the Civil War, proved that the states could effectively oppress citizens just as a powerful federal government lacking the constraints of the Bill of Rights might have.[47] The proponents of the Fourteenth Amendment well understood this history of abuses by state governments. As the author of part of the Fourteenth Amendment put it:

> The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws. . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took

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44. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 111 (Northeastern Univ. Press 1983) (1955).

45. Melvyn R. Durchslag, *Salyer, Ball, and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1, 2-3 n.8 (1982) (citing K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 48-76 (2d ed. 1969)).

46. For example, Antifederalist Joshua Atherton argued against the adoption of the Constitution because of the slave trade, telling the Convention "that by voting for the Constitution 'we become consenters to, and partakers in, the sin and guilt of this abominable traffic, at least for a certain period, without any positive stipulation that it should even then [1808] be brought to an end.'" RUTLAND, *supra* note 44, at 165.

47. *See generally* FONER, *supra* note 8.

> property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?[48]

The history of state-sanctioned abuses of citizens, before and after the Fourteenth Amendment, and particularly in minority communities, is too voluminous to summarize here. Hostility to law enforcement in minority communities has been well documented. As the *Kerner Commission Report* put it, "[A]brasive relationships between police and . . . minority groups have been a major source of grievance, tension, and ultimately disorder.[49] Severe abuses in some of America's prisons have likewise been well documented.[50] As the Supreme Court put it in 1977 speaking of Alabama's prison system:

> The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by "rampant violence" and a "jungle atmosphere," are constitutionally intolerable.[51]

Even a cursory review of those abuses discloses the reason for federal constitutional protections as a counter, however incomplete, to state oppression.

The debate over whether the massive changes in criminal procedure of the 1960's was driven by "concerns about racism"[52] or by "longstanding fears about the abuse of state power"[53] is unnecessary to the present concern. It suffices that the courts had compelling reasons to bring state criminal procedures, and state jails and prisons, under federal constitutional constraints. The Due Process Clause of the Fourteenth Amendment supplied the fulcrum for this enormous change and 42 U.S.C. § 1983 supplied the most effective, and often resorted to, remedy.

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48. Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 685 n.45 (1978) (citing Cong. Globe, 42d Cong. 1st Sess., 85 (1871)).

49. The Kerner Commission, *supra* note 1, at 157.

50. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 681-85 (1978).

51. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (citation omitted).

52. Joshua Cohen & Joel Rogers, *Editor's Preface* to TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES xv, xvi (Joshua Cohen & Joel Rogers eds., 1999).

53. *Id.*

The Fourteenth Amendment, ratified in 1868, was designed, in part, to protect the newly freed slaves.[54] Section One, among other things, made citizens of the newly freed slaves, and required the states to afford all citizens due process and equal protection of the law.[55] It quickly came to prevent invidious discrimination against other racial groups.[56] There is controversy over how broadly the Fourteenth Amendment swept in that era.[57] Whatever the historical basis for the Due Process Clause, its sweep broadened as various elements of the Bill of Rights became incorporated into the concept of due process.

Beginning with *Gitlow v. New York*[58] in 1925 the Supreme Court began to apply the various guarantees of the Bill of Rights to the states by incorporating them into the protections of the Due Process Clause of the Fourteenth Amendment. Thus, broad due process language came to include other rights found within the first ten amendments. After some debate about the theoretical basis for incorporation, the Court decided upon selective incorporation of those parts of the Bill of Rights that were considered to be fundamental to an ordered liberty.[59] Thus, not all of the first ten amendments to the Constitution were applied to the states as a result of incorporation into the Due Process Clause. As the Court in *Duncan v. Louisiana* put it in 1968:

> The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; whether it is "basic in our system of jurisprudence"; and whether it is "a fundamental right, essential to a fair trial."[60]

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54. Carol Rhodes, Symposium, *Changing the Constitutional Guarantee Voting Rights from Color-Conscious to Color Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. C.L. REV. 309, 317-18 (1996).

55. U.S. CONST. amend. XIV, § 1.

56. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the enforcement of city regulations, which resulted in the imprisonment of only Asian-American citizens, violated the Fourteenth Amendment).

57. *See, e.g.*, Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 402-34 (1998) (debating the effect of the Fourteenth Amendment on the era).

58. 268 U.S. 652 (1925).

59. STONE ET. AL, CONSTITUTIONAL LAW 706-09 (4th ed. 2001).

60. Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (citations omitted). In *Duncan*, the Court held that the right to trial by jury guaranteed by the Sixth Amendment was applicable to the states by virtue of incorporation into the Due Process Clause. *Id.*

Throughout the 1960's the Supreme Court applied more and more of the protections of the Bill of Rights to state criminal prosecutions. As the Court summarized the status of the issue:

> The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.[61]

The constitutional ban on cruel and unusual punishments under the Eighth Amendment was applied to the states in *Robinson v. California*,[62] which placed jails and prisons under increased constitutional scrutiny. No longer were prison cases limited to conscience shocking conduct that was "offensive to a decent respect for the dignity of man, and heedless of his freedom."[63] Pre-trial detainees, who have not been convicted, and thus cannot be punished, do not come under the Eighth Amendment ban on cruel and unusual punishments.[64] However, federal pre-trial detainees now have constitutional protection under the Due Process language of the Fifth Amendment.[65] Similarly, state and local detainees have protection under the Due Process Clause of the Fourteenth Amendment.[66]

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61. *Id.* at 147-48.

62. 370 U.S. 660 (1962).

63. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring). Although, in *Francis*, eight members of the Supreme Court were prepared to assume without deciding that the Eighth Amendment applied to the states, *see id.* at 375-78, the issue was not decided until *Robinson*, 370 U.S. at 660. Under preincorporation due process analysis, a state's action had to literally shock the judicial conscience before a federal court would intervene. *See, e.g.*, Rochin v. California, 342 U.S. 165, 171-173 (1952).

64. Bell v. Wolfish, 441 U.S. 520, 537 n.16 (1979) (citing Ingrahm v. Wright, 430 U.S. 651, 671-72 (1977)).

65. *Id.* at 535-37.

66. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (addressing presumption of innocence implied by the Due Process Clause of the Fourteenth Amendment).

Thus, constitutional restrictions increasingly restrained and regulated discretionary police and correctional officers' conduct.

This growing constitutional regulation of state and local officials, including law enforcement and correctional officers, led directly to liability issues. Violation of a person's basic constitutional rights by another person, acting on behalf of a state or local government, triggered the protection of an old post-Civil War statute—the Civil Rights Act of 1871, now 42 U.S.C. § 1983. For a time, the Civil Rights Act was restrictively read to include only the actions of state officials that were expressly authorized by state law.[67] This conservative reading of § 1983 began to change at about the same time that the Due Process Clause was selectively incorporating many of the guarantees of the federal Bill of Rights.[68]

Similar liability rules also came to apply to federal officials.[69] The application of major parts of the Bill of Rights to the states provided the basis for § 1983 actions to work. For example, the very first case imposing federal liability upon state or local law enforcement, *Monroe v. Pape*,[70] would not have been possible without the Supreme Court's 1949 decision in *Wolf v. Colorado*.[71] *Wolf* held that the Fourth Amendment right to be free from unreasonable searches and seizures applied to the states by virtue of incorporation in the Fourteenth Amendment.[72] *Monroe* dealt with local law enforcement officers who violated a citizen's constitutional rights under the Fourth Amendment.[73] Before the Fourth Amendment applied to the states, a lawsuit against state or local officers could not have been based upon such a constitutional violation. There had to be a federal right before one had any federal basis for suit; there had to be a violation of federal law before § 1983 could apply.[74] Once the federal right applied to state officials, lawsuits seeking a remedy for the violation of that right became conceivable. It is only a small step from lawyers being able to conceive of a successful lawsuit to someone attempting that suit. Thus, the imposition of liability upon state officials under 42 U.S.C. § 1983 is inextricably interwoven with the civil rights revolution applying the Bill of Rights to state criminal prosecutions. The two cannot be separated. Once this had been achieved, it was only a

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67. Eric H. Zagrans, *'Under Color of' What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 524-25 (1985).

68. *See* FEELEY & RUBIN, *supra* note 41, at 32-34.

69. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

70. 365 U.S. 167 (1961).

71. 338 U.S. 25 (1949).

72. *Id.* at 27-28.

73. 365 U.S. at 167.

74. David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1142-44 (2000).

short step to apply the same rules to federal law enforcement and corrections officials.

IV. The Early Decisions: The Beginnings of Federal Liability for Official Misconduct in Law Enforcement

Monroe v. Pape[75] changed everything. Before it, state and local law enforcement officials were not subject to federal liability; after it, such suits became possible.

One can hardly imagine better facts for a plaintiff aiming to create new law. Thirteen Chicago police officers broke into the Monroe's home without a warrant, rousted the family from bed, and made both husband and wife stand naked while they searched the place, ransacked every room, emptied drawers, and ripped mattress covers.[76] Mr. Monroe was detained 10 hours on "open" charges and questioned about a two-day old murder; he was not taken before a magistrate, even though one was available, and not allowed to call his family or a lawyer.[77] He sued under 42 U.S.C. § 1983, alleging that the officers acted under color of state and city law.[78]

The *Monroe* complaint alleged a violation of the "guarantee against unreasonable searches and seizures contained in the Fourth Amendment [which] has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment."[79] Neither the officers nor the city contended that it would have been reasonable, within the meaning of the Fourth Amendment, to break into a house, conduct a warrantless search, and force the occupants to stand naked in the middle

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75. 365 U.S. 167 (1961). There were several precursors to *Monroe*, which relaxed the "color of law" standard to include actions by governmental officials that were made possible because the actor was clothed with the power of state law. *See, e.g.,* United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."); Screws v. United States, 325 U.S. 91 (1945) (finding Georgia police officers, although violating state and federal law, acted "under color of law" because the violation arose out of the authority granted to them by state law). However, it was not until *Monroe* that the floodgates to federal litigation in official misconduct cases opened. Jeffrey Brian Greenstein, *The First Amendment v. the First Amendment: The Dilemma of Inherently Competing Rights in Free-Speech Based "Constitutional Torts,"* 71 UMKC L. Rev. 27, 61 n.267 (2002). The incorporation of many of the guarantees of the Bill of Rights into the Due Process Clause, a process that accelerated in the 1950's and 60's, played a large part in making *Monroe* possible.

76. *Monroe*, 365 U.S. at 169.

77. *Id.*

78. *Id.*

79. *Id.* at 171.

of everything while the house was torn apart.[80] Neither did they contend that the warrantless seizure and subsequent incommunicado detention was reasonable.[81] If any police search and seizure could be said to have been unreasonable under the Fourth Amendment, this surely was it. The question, however, was not whether the police violated Monroe's constitutional rights, but rather, whether this violation gave rise to a federal cause of action under § 1983.[82]

This case is very different from the usual way in which an illegal search and seizure issue is framed. Much of the complaint against the Supreme Court's application of the exclusionary rule to the states,[83] concerned the resultant freeing of demonstrably guilty, and occasionally dangerous, criminals.[84] When evidence is suppressed because the police have behaved illegally the prosecution often loses its clearest evidence of guilt. No one likes to free a murderer, or other dangerous felons, because the "constable has blundered."[85] In *Monroe*, however, we are not concerned with the suppression of evidence in a criminal trial. Rather, the issue is whether an innocent person should have a federal remedy for damages caused by an illegal search.

It is easy to criticize supposed technicalities that free the obviously guilty. One's perspective changes when the issue becomes how to protect the innocent from abusive governmental intrusion. Given the failure of the various state courts to adequately address this type of claim prior to 1961, one also ought to ask whether even the guilty should suffer Monroe's humiliation without effective redress. One person's technicality becomes another's issue of freedom. However one views the issue politically, the issue comes down to how society protects itself from governmental abuse while maintaining order.

The officers in *Monroe* contended that § 1983 could not apply where state law already prohibited the conduct and provided a remedy for the violation.[86] They argued that since their activities violated state law, for which the state supplied a civil remedy, they could not have acted "under color of state law."[87] Put another way, actions "under the color of law" seem inconsistent with actions that violate law. One cannot, they thought, act under a law and violate it at the same time.[88] Thus, the

80. *See id.* at 170.
81. *See id.*
82. *Id.* at 172.
83. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to the states).
84. *See id.* at 658.
85. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
86. *Monroe*, 365 U.S. at 172.
87. *Id.*
88. *Id.*

Court confronted the question: does the "under color of" state law requirement include acts of officials who violate state law where state law provides a remedy?[89]

It might seem fair, if state law supplies a remedy, to send the plaintiff back to state court. Why tie up a busy federal district court with a matter that could be resolved in state court? However, one has only to review the various states' lack of interest in allowing citizens to sue abusive state officials, to see that this was a remedy available in theory only. States, whatever their individual laws might say, were not overly hospitable to claims that their officials had violated citizens' rights.[90] Moreover, it was clear that this state inaction, in the face of governmental abuse, was one of the original reasons for § 1983's enactment.

While the officers' narrow construction of § 1983 had enjoyed support in earlier years, the notion that it did not touch official actions that were a misuse of state power had been eroded in two cases from the 1940's.[91] The Supreme Court rejected the officer's contention and held that the "under color of" state law language in § 1983 includes official actions, regardless of whether those actions violated state law.[92] The Court reasoned that the statute was enacted to provide redress for violations of federal law.[93] That an unreasonable search violates the Fourth Amendment and the Fourth Amendment had, by this time, been made applicable to the states through incorporation into the Due Process Clause of the Fourteenth Amendment.[94]

According to the Court, the purposes of § 1983 were:

1. to supersede certain state laws that were contrary to the rights or privileges of U.S. citizens;
2. to provide a federal remedy in areas where state protection was deficient; and
3. to provide a federal remedy when a state remedy was unavailable.[95]

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89. *Id.*

90. *Id.*

91. United States v. Classic, 313 U.S. 299 (1941); Screws v. United States, 325 U.S. 91 (1945). In holding state officials (commissioners of elections) criminally liable, the *Classic* court was instrumental in redefining "color of law," declaring misuse of state authority is "action taken 'under color of' state law." *Classic*, 313 U.S. at 326. This view was affirmed in *Screws*, where the Court held that the abuse of a prisoner attempting to escape, by police officers, was done "under the color of law." *Screws*, 325 U.S. at 107-08.

92. *Monroe*, 365 U.S. at 172, 183.

93. *Id.* at 171.

94. *Id.* (citing Wolf v. Colorado, 338 U.S. 25 (1949); Elkins v. United States, 364 U.S. 206, 213 (1960)).

95. *Id.* at 173-74.

Because Congress, in enacting the predecessor to § 1983, had intended to provide a remedy for official misconduct even when in violation of state law, it clearly covered the situation at bar where the police had engaged in a patently illegal search and seizure.[96] Accordingly, *Monroe* held that a state law enforcement officer could be held civilly liable in federal court for violating the constitutional rights of a U.S. citizen, even when those activities violated state laws that could have been redressed in state courts.[97] Thus, the criminal procedure revolution of the 1960's directly led to federal liability for state law enforcement officers.

Additionally, *Monroe* was against the City of Chicago.[98] That part of the *Monroe* decision, which held that the city was immune from such lawsuits, was later overruled by *Monell v. Department of Social Services of City of New York*,[99] thereby allowing municipalities and other arms of local government to be sued, albeit, under restrictive circumstances.

V. CORRECTIONAL OFFICERS

Monroe only involved law enforcement officers.[100] Its central holding, however, applied to all state officials, including corrections officers, who violate a person's federally protected rights.[101] *Monroe* could plausibly be read as a prisoner's rights case. The plaintiffs had alleged that the officers had made Monroe a prisoner—first, by holding him *incommunicado* to investigate the case, and also by imprisoning him without trial.[102] However, because *Monroe* turned on the Fourth Amendment's prohibition against unreasonable seizures rather than the Eighth Amendment's prohibition of cruel and unusual punishments, it is more easily read as a law enforcement case rather than as a corrections case. Nonetheless, it is impossible to overstate the broad nature of the holding; *Monroe* came to cover all matters of misconduct by all types of state officials.

One year after *Monroe*, the Supreme Court incorporated the Eighth Amendment's ban on cruel and unusual punishment into the Fourteenth Amendment's Due Process Clause in *Robinson v. California*.[103] *Robinson,* despite its broader implications, was not a prisoner's rights case. It was not concerned with prison conditions or illegal confinements; rather,

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96. *Id.* at 172-76.
97. *Id.* at 183.
98. *Id.* at 174.
99. 436 U.S. 658 (1978).
100. *Monroe*, 635 U.S. at 169.
101. *Id.* at 186-87. The court declared the "color of law" interpretation under *Classic* and *Screws* to be correct in light of Congress' decision not to affirmatively restrict the language in the subsequent amendments that followed the two cases. *Id.* at 187.
102. *Id.* at 204 (Frankfurter, J., dissenting).
103. 370 U.S. at 667.

it involved a simple appeal from a criminal conviction.[104] The Court's narrow holding invalidated a state statute making simple addiction to narcotics, without more, a crime.[105] Punishment for drug addiction, the Court held, constitutes cruel and unusual punishment and cannot, therefore, constitute the sole basis for a conviction.[106] The broader principle, however, that the Eighth Amendment ban on cruel and unusual punishment applied to the states, opened the door for state officials, including correctional officers, to be held responsible under § 1983. Such cases were not long in coming.

For example, in 1964 the Court held that a prisoner's allegation that he was denied permission to purchase religious materials solely because of his religious beliefs stated a cause of action.[107] Thereafter, the Supreme Court applied § 1983 to prisoners' cases.[108] In 1972, the Court in *Cruz v. Beto* allowed a § 1983 action by a Buddhist prisoner who had been denied religious rights while in prison.[109] The Court held that a prisoner must be given "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts. . . ."[110] Moreover, prisoner cases alleging violations of 42 U.S.C. § 1983 were increasingly filed in the lower federal courts.[111] In the decade following *Monroe*, more than ninety prison cases involving § 1983 were reported in the various federal courts of appeals.[112] It did not take long for federal liability under § 1983 to become meaningful to both the law enforcement and corrections communities.

VI. Liability of Federal Officials

It would have seemed perverse to the ordinary citizen had the Court shielded federal officers from liability for wrongdoing now applied to their state counterparts. The citizen, who has been unlawfully beaten, searched, shot, or arrested, hardly cares whom the officer's employer might be. Nonetheless, courts typically attempt to ground their decisions

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104. *Id.* at 660-61.

105. *Id.* at 666-67.

106. *Id.* (declaring the act unconstitutional since it imprisoned individuals who have never had contact with any drug or have been guilty of any troublesome behavior).

107. Cooper v. Pate, 378 U.S. 546 (1964).

108. *See generally* Houghton v. Shafer, 392 U.S. 639 (1968); Wilwording v. Swenson, 404 U.S. 249 (1971).

109. 405 U.S. 319 (1972).

110. *Id.* at 322.

111. For an excellent and exhaustive account of the judicial reform of prisons in the United States see generally Feeley & Rubin, *supra* note 41.

112. A Lexis-Nexis search of prison cases from 1961 to 1971 and involving at least some aspects of a § 1983 action revealed 92 cases in the several courts of appeals.

in positive law. Where was the law that supplied a remedy as against federal law enforcement and corrections officers? As we have seen, 42 U.S.C. § 1983 only applies to persons acting under color of law of "any State or Territory or the District of Columbia."[113] The U.S. government is not encompassed by this language, and § 1983 does not apply to persons acting under color of federal law. Judges are not supposed to make law up as they go along, yet, occasionally they must create. It could hardly be otherwise. Anomalies are the inevitable consequence of Supreme Court decision-making that is by design piecemeal and limited to the facts of the specific cases before it. The Court's opportunity to address the gap created by *Monroe* came in 1971.

The Supreme Court in *Bivens v. Six Unknown Narcotics Agents* addressed the question "whether [a] violation of [the Fourth Amendment prohibition against unreasonable searches and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."[114] Bivens alleged that Federal Bureau of Narcotics agents, without a warrant, without probable cause, and with an unreasonable use of force, arrested him in his home, searched his home, handcuffed him in front of his wife and kids, threatened to arrest his entire family, took him to a federal courthouse, interrogated him, booked him, and strip searched him.[115] While this seems no worse than the police behavior in *Monroe*, these allegations, if true, constituted clear abuse of authority. Like the plaintiff in *Monroe*, Bivens provided the Court with a sympathetic injured citizen.

The federal agents, somewhat like the defendants in *Monroe*, argued that Bivens should be limited to his remedies in state court.[116] Under this theory, the Fourth Amendment would serve to limit the extent to which the officers could defend the case under state law.[117] In addition, a violation of the Fourth Amendment would deprive them of the defense that their actions were a valid exercise of federal power.[118] This, so their argument went, would open the federal agents to liability under state tort law, just like any other private citizen.[119]

The Department of Justice, however, conceded that had Bivens sued in state court, the Department would have removed the case to federal

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113. 42 U.S.C. § 1983.

114. 403 U.S. 388, 389 (1971).

115. *Id.*

116. *Id.* at 390-91 (arguing that Bivens' claim was an unconstitutional invasion of privacy, a state tort that could only be redressed in the state courts).

117. *Id.*

118. *Id.*

119. *Id.* at 391.

court.[120] The Federal District Court would then have faced the problem of deciding the case under state law.[121] This would deprive the citizen of a federal remedy, while it would still put the case before a federal judge who would have to apply unfamiliar state law.

Moreover, this position might well have granted amnesty to the federal agents even though their actions violated the Constitution.[122] Exoneration would have resulted in placing federal agents in the position of private citizens acting under state law.[123] State law does not necessarily mirror the Fourth Amendment. For example, an arrest made without probable cause would violate the Fourth Amendment but still could be permissible under state law.[124] Placing federal officers, who have violated the Fourth Amendment, in the position of private citizens under state law, would erect state law hurdles that state officers, sued under 42 U.S.C. § 1983, would not face.

Further, the interests protected by state tort law and the Fourth Amendment are different.[125] We may keep trespassers and intruders out and we can seek police protection against them; we are not, however, entitled to obstruct federal law enforcement entry, whether or not they act illegally.[126] No state police officer will come to our aid in refusing entry to federal law enforcement. Indeed in many states, it is a crime to resist law enforcement officers regardless of whether they are acting under lawful authority.[127] Since state law can neither authorize, nor limit, federal agents in conducting a search, the federal question "becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action."[128] Finally, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interest in liberty."[129] Thus,

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120. *Id.*

121. *Id.*

122. *See id.* at 392 (declaring abuse under color of law by federal agents is more harmful than abuse from an individual with no authority).

123. *Id.* at 391-92.

124. *Id.* at 392 (illustrating the example of a valid citizen's arrest effectuated without probable cause).

125. *Id.* at 394 (referring to the differences between state tort laws of trespass and invasion of privacy and the constitutional protections against illegal searches and seizures).

126. *Id.*

127. *See, e.g.*, Penn Lerblance, *Resisting Unlawful Arrest: A Due Process Perspective*, 35 CLEV. ST. L. REV. 261, 269-70 (1987). As Lerblance explains, Illinois's legislature passed a law that made the resistance of an arrest a crime, regardless of whether the arrest was lawful. *Id.* In addition, Lerblance reports that some courts have done away with the judicial-made rule of the right to resist arrest. *Id.*

128. *Bivens*, 403 U.S. at 395.

129. *Id.*

the judicial creation of a damage remedy seemed no large innovation. The majority concluded that, assuming the validity of Bivens' allegations, there is a federal remedy for constitutional violations by federal law enforcement officers.[130]

Chief Justice Burger dissented, arguing that only the legislature could appropriately fill this gap in the law.[131] However anomalous, Burger would not have created a remedy for wrongdoing by federal law enforcement officers. Justice Burger, in a provocative proposal, sought to throw out the exclusionary rule if, and only if, Congress created a civil damage remedy for Fourth Amendment violations.[132] Justice Burger was perhaps ahead of the debate. Now even some liberals, who might once have energetically defended the exclusionary rule, are prepared to consider whether substituting a civil remedy could better deter police misconduct.[133]

Bivens was limited to violations of the Fourth Amendment.[134] Unlike § 1983, it did not touch other kinds of constitutional violations; nor did it encompass other violations of federal statutory law. The Supreme Court has since extended *Bivens* to violations of the Fifth and Eighth Amendments, thus encompassing most instances of constitutional misconduct.[135] This makes *Bivens* the functional equivalent to 42 U.S.C. § 1983, at least insofar as constitutional violations by federal law enforcement and correctional officers are concerned.[136]

Bivens has been subject to some judicial narrowing in recent years. It is not applicable to Social Security denials where extensive federal reme-

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130. *Id.* at 397.

131. *Id.* at 411-12, 418 (Burger, C.J., dissenting).

132. *Id.* at 415.

133. *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

134. *Bivens*, 403 U.S. at 389.

135. Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment cause of action); Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment cause of action).

136. *Bivens*-type actions are similar in scope with § 1983 actions. *See, e.g., Carlson*, 446 U.S. at 22 (pointing out that punitive damages can be had in both *Bivens* and § 1983 actions). The qualified immunity doctrine applies with equal force to both types of actions as well. *See, e.g.*, Cleavinger v. Saxner, 474 U.S. 193 (1985) (applying doctrine of qualified immunity of federal prison officials in a *Bivens*-type action); Malley v. Briggs, 475 U.S. 335 (1986) (applying the qualified immunity doctrine to a § 1983 action). Finally, liability under the Federal Tort Claims Act (FTCA) for the intentional torts of law enforcement officers "is coterminous with . . . *Bivens*." Norton v. U.S., 581 F.2d 390, 393 (4th Cir. 1978) (holding that good faith is a defense for an intentional tort under 28 U.S.C. 2680(h) just as it would have been under a *Bivens* action). Thus, for most practical purposes, one need not distinguish between § 1983, *Bivens*, and the FTCA; the rules creating civil liability are identical in most cases.

dies have already been supplied by Congress.[137] Likewise, it is not applicable to enlisted military personnel who operate under a separate congressionally created system of justice.[138] Finally, *Bivens* is not applicable to alleged violations of governmental employees' freedom of speech, again because of the extensive administrative remedies provided by Congress.[139] These decisions do not affect the liability of federal officers for constitutional violations of citizen's rights. They do, however, serve to remind us that, while § 1983 and *Bivens* actions are based on the Constitution, they are not themselves commanded by the Constitution. Congress could, at any time, change the rules.

VII. THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA)[140] should be mentioned briefly. The FTCA is applicable to the intentional torts of federal agents "who [are] empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."[141] Thus, the Act covers most law enforcement officers; however, liability is placed against the federal government rather than the individual officers.[142] One may bring an FTCA claim concurrently with a *Bivens* action,[143] but an election must be made.[144] In addition, a FTCA judgment against the government will bar a subsequent *Bivens* claim.[145]

The advantage of proceeding under the FTCA is that one looks to the deep pockets of the federal government for recovery rather than against the often judgment-proof individual officers.[146] Unlike *Bivens* and

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137. Schweiker v. Chilicky, 487 U.S. 412 (1988).

138. Chappell v. Wallace, 462 U.S. 296 (1983).

139. Bush v. Lucas, 462 U.S. 367 (1983).

140. Pub. L. 108-356, ch. 753, 60 Stat. 842 (1946) (codified as revised in scared sections of 28 U.S.C.).

141. 28 U.S.C. § 2680(h) (2000).

142. 28 U.S.C. § 1346(b) (2000). In 1974, this amendment made the intentional torts of assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution actionable against the government. *Id.*

143. *See generally* Stefan Sciaraffa, Note, *Section 2676 of the FTCA: Why It Should Not Bar Contemporaneously Filed Bivens Claims*, 24 AM. J. CRIM. L. 147 (1996) (discussing simultaneously filed actions and criticizing the barring effect the FTCA has on the judgment).

144. 28 U.S.C. § 2676 (2000); *see also* Ting v. United States, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) (requiring election); Aetna Casualty & Surety Co. v. United States, 570 F.2d 1197, 1201 (4th Cir. 1978) (refusing to impose joint and several liability); Moon v. Price, 213 F.2d 794, 796-97 (5th Cir. 1954) (same); United States v. First Sec. Bank of Utah, 208 F.2d 424, 428 (10th Cir. 1953) (same).

145. 28 U.S.C. § 2676.

146. *See* Sciaraffa, *supra* note 143, at 150 n.11 (reporting the policy reasons announced by the 93rd Congress).

§ 1983,[147] however, punitive damages and trial by jury are not available under the FTCA,[148] attorney's fees are limited to 25% of the recovery,[149] and there is a two-year statute of limitations.[150] Often plaintiffs will initially proceed simultaneously against the federal officers under *Bivens*, any state officers that may be involved under § 1983, and against the deep-pocketed federal government under the FTCA. If the case is strong and punitive damages are perceived to be recoverable, the FTCA claim may be dropped in favor of the more lucrative *Bivens* action. As a practical matter, the FTCA is of less importance to most law enforcement and correctional officers than *Bivens* and § 1983.

VIII. THE ELIMINATION OF AN EXHAUSTION OF STATE REMEDIES REQUIREMENT FROM MOST CASES UNDER 42 U.S.C. § 1983

The *Monroe* Court had indicated that exhaustion would not be required in § 1983 litigation: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[151]

A series of early cases extended *Monroe* by eliminating any exhaustion-of-remedies requirement in a variety of differing factual situations arising under § 1983.[152] This freed plaintiffs from having to exhaust state court or state administrative remedies before instituting an action under 42 U.S.C. § 1983.

For example, state courts and state administrative agencies frequently posed an impenetrable impediment for the civil rights movement. State law often provided a remedy for official misconduct that looked good on paper but in practice provided no relief. Civil rights activists were particularly vulnerable to state manipulation of the court system. Among other things, elimination of the exhaustion requirement made civil rights litiga-

147. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 21-22 (1980); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

148. 28 U.S.C. § 2674 (2000); *see also Carlson*, 446 U.S. at 22.

149. 28 U.S.C. § 2678 (2000); *see also* Campbell v. United States, 835 F.2d 193, 196 (9th Cir. 1987); Joe v. United States, 772 F.2d 1535, 1536-37 (11th Cir. 1985).

150. 28 U.S.C. § 2401(b) (2000).

151. Monroe v. Pape, 365 U.S. 167, 183 (1961).

152. *See, e.g.*, McNeese v. Bd. of Educ., 373 U.S. 668 (1963) (concerning segregation of a public school); Damico v. California, 389 U.S. 416 (1967) (regarding welfare benefits); Houghton v. Shafer, 392 U.S. 639 (1968) (relating to the seizure of a prisoner's legal material); King v. Smith, 392 U.S. 309 (1968) (involving federal aid to families with dependent children).

tion much easier. *McNeese v. Board of Education*[153] provides a good example.

In *McNeese*, the plaintiffs claimed that the local school system remained segregated in violation of federal law.[154] The District Court dismissed the complaint, among other things, on the ground that the plaintiffs had not exhausted the remedies provided by state law.[155] The court of appeals agreed but the Supreme Court reversed and allowed the suit to proceed in federal court without reference to possible state court remedies.[156]

Most police misconduct cases, therefore, will not be affected by anything that the state courts or state administrative agencies do. However, Congress, in enacting 42 U.S.C. 1997e, returned the exhaustion-of-remedies requirement in prisoner suits under § 1983.[157] That Act provides in part:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.[158]

Because of this, prisoners must exhaust state administrative remedies before filing § 1983 actions in federal court. Cases against state officials, including police officers and their municipal employers, have no such requirement.[159]

IX. Injunctions Against State Criminal Prosecutions Involving Constitutionally Protected Conduct

Criminal prosecutions are different. One ordinarily could not enjoin a state criminal prosecution by filing a § 1983 action. Federal courts frequently followed this practice even though the state action may trench upon constitutionally protected rights.[160] Prior to *Dombrowski v. Phister*,[161] decided only four years after *Monroe*, federal courts did not interfere in state court criminal proceedings, but could "depart from [this

153. 373 U.S. at 668.
154. 373 U.S. at 669-70.
155. *Id.* at 670.
156. *Id.* at 674-75.
157. 42 U.S.C. § 1997e (2000).
158. *Id.*
159. Patsy v. Bd. of Regents, 457 U.S. 496 (1982).
160. Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 343 (6th ed. 2002) (citing, as the leading case, Douglas v. City of Jeanette, 319 U.S. 157 (1943)).
161. 380 U.S. 479 (1965).

limitation] if necessary to prevent irreparable injury."[162] *Dombrowski* changed this, if only a little bit.

Dombrowski permitted the federal courts in a § 1983 action to enjoin threatened state prosecution of civil rights activists under a state's facially overbroad, "subversive activities" statute. This seemingly had the potential to dramatically change the prevailing practice, at least where no prosecution had formally commenced. Had it not been significantly constrained by later case law,[163] *Dombrowski* would also have greatly expanded federal judicial power at the expense of the states.

Dombrowski is best explained as a product of the civil rights era. The Supreme Court of that era often found it necessary to stop southern states from prosecuting legitimate political activity under the guise of other laws, such as vagrancy.[164] Many of these civil rights cases involved outrageous facts, which drove changes in U.S. constitutional law.

Dombrowski was the executive director of an organization that actively fostered civil rights for African-Americans in the South.[165] The organization, its attorney, and Dombrowski were continually threatened with arrests, seizures, and threats of prosecution under Louisiana's constitutionally overbroad statute involving so-called "subversive activities."[166] Louisiana authorities were invoking the law, not to obtain convictions, but rather to harass activists and to "discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."[167] The Court avoided the possible application of the Anti-Injunction Act[168] by pointing out that the state grand jury had not convened until after the filing of the federal complaint.[169] There was, quite literally, no state prosecution in existence at the time of the filing and thus no state proceedings within the meaning of the Anti-Injunction Act.[170]

Noting the chilling effects that this kind of harassment had on free speech, the Court found that, if the allegations were true, injunctive relief should have been granted by the lower federal courts.[171] The pertinent question at the time was how broadly the case was to be read. Could it be used whenever free speech rights could be chilled by overzealous state

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162. *See, e.g.*, WRIGHT, *supra* note 160, at 343.
163. *See infra* part X.
164. *See, e.g.*, Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).
165. *Dombrowski*, 380 U.S. at 482.
166. *Id.*
167. *Id.*
168. 28 U.S.C. § 2283 (2000).
169. *Dombrowski*, 380 U.S. at 485.
170. *Id.* at 484.
171. *Id.* at 487-91.

prosecution, or was the case limited to situations where the prosecution was acting in bad faith or where there were other extraordinary circumstances justifying federal intervention in state prosecutions?

Many litigants read *Dombrowski* broadly to permit federal court intervention to stop any state prosecution that had a chilling effect on free speech.[172] This interpretation, had it proved correct, would have provided a substantial avenue for interfering in state criminal prosecutions. However, six years later, the Supreme Court decided *Younger v. Harris*.[173] The Court narrowly confined *Dombrowski* to free speech cases in circumstances involving bad faith or harassment, where state law was so clearly illegal as to be void in all possible circumstances, or where other unusual circumstances existed.[174] Absent these factors, a federal court ordinarily should abstain from interfering in state prosecutions regardless of the potential chilling effect on speech.[175]

Mitchum v. Foster[176] drove home the narrowness of this opening. Mitchum sought a federal injunction under 42 U.S.C. § 1983 when a state court closed his bookstore, arguing that the bookstore's closing violated his freedom of speech and due process.[177] In a case of first impression, the Court held that a § 1983 claim satisfied the "expressly authorized" exception of 28 U.S.C. § 2283 and empowered federal courts to enjoin a state criminal proceeding[178]—a holding neither *Dombrowski* nor *Younger* touched on.[179] The ruling was expressly narrowed to the facts of the case, underscored by the announcement that the Court would "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."[180]

Notwithstanding *Dombrowski's* narrow reach, lower courts continued to find circumstances where prosecutorial bad faith warranted injunctive relief, especially in cases that involved free speech values.[181]

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172. *See* WRIGHT, *supra* note 160, at 343-44.
173. 401 U.S. 37 (1971).
174. *Id.* at 53-54.
175. *Id.* at 54.
176. 407 U.S. 225 (1972).
177. *Mitchum*, 407 U.S. at 227.
178. *Id.* at 226.
179. *Id.*
180. *Id.* at 243.
181. Farmer v. Sherrod, No. 2:93-CV-0017-J, 1993 U.S. Dist. LEXIS 5526, at *31-32 (N.D. Tex. 1993) (preliminary injunction granted after finding substantial evidence indicating prosecutions were retaliatory); Westin v. McDaniel, 760 F. Supp. 1563, 1568 (M.D. Ga. 1991), *aff'd*, 949 F.2d 1163 (11th Cir. 1991) (comity and federalism did not prevent federal injunction against prosecutor seeking a grand jury indictment after the felonious charge was dismissed following a commitment hearing); PHE, Inc. v. Dep't of Justice, 743 F. Supp.

Moreover, injunctions against law enforcement agencies prevented illegal arrests and other forms of intimidation where no prosecution existed.[182] Thus, in *Alle v. Medrano*, an injunction against law enforcement officers to prevent a pervasive pattern of illegal arrests and intimidation of farm union organizers under unconstitutional Texas statutes was proper since there were no pending state prosecutions and injury would have been irreparable without the remedy.[183] *Younger* does not apply where there is no current state prosecution.[184] *Allee*'s holding, therefore, permits injunctions against law enforcement action where "there is a persistent pattern of police misconduct."[185] On the other hand, isolated instances of police misconduct will not justify injunctive relief.[186] Finally, a federal court may enter declaratory relief on the constitutionality of a state statute without any showing of bad-faith or other special circumstances.[187] Because of these ways around the *Younger* doctrine, and because of the persistence of official attempts to suppress legitimate activities, including political dissent, suits aimed at deterring law enforcement from exceeding appropriate bounds continue to persist.

X. THE MEANING OF THE 'UNDER COLOR' OF LAW REQUIREMENT OF § 1983

Before any liability can attach under § 1983, the act must occur "under color" of law.[188] This phrase includes actions by territories or the District of Columbia.[189] Liability under § 1983, however, does not include the federal government or Indian tribal governments;[190] neither action is promulgated in 42 U.S.C. § 1983.[191]

15, 27 (D.D.C. 1990) (enjoining multiple prosecutions until case was resolved on the merits). *Cf.* Fitts v. Kolb, 779 F. Supp. 1502, 1516 n.47 (D.S.C. 1991) (withdrawing injunctive relief request after state criminal libel statute was held unconstitutional).

182. *See* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (holding that threatened prosecution, as opposed to prosecution that was pending, did not preclude declaratory relief in a federal court action, even in the absence of bad faith enforcement or other special circumstances).

183. 416 U.S. 802, 817 (1974).

184. *See id.* at 814.

185. *Id.* at 815.

186. *Id.*

187. *Steffel*, 415 U.S. at 483-84.

188. 42 U.S.C. § 1983 (2000).

189. *Id.*

190. *See, e.g.*, Theresa R. Wilson, *Nations Without a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 109-10 (1999-2000) (illustrating Congress' intent to intentionally continue to immunize tribal nations).

191. 42 U.S.C. § 1983.

As we have seen, the "under color of law" requirement was narrowly construed by nineteenth century courts. *Monroe* expanded this concept by holding that officials acting illegally may yet be acting under color of law.[192] It remained to be seen whether, and under what circumstances, private citizens could be liable under § 1983.

One can see a close parallel between state actors proceeding under color of state law and state action required under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause only prohibits states—not other entities or people—from denying citizens due process of law.[193] The Supreme Court during Reconstruction had held that a purely private citizen, acting without any state assistance, cannot violate the Fourteenth Amendment Due Process Clause—there must, at least in some sense, be state action.[194] This requirement continues to be strictly enforced.[195] Similarly, liability under 42 U.S.C. § 1983 is triggered only upon action that is under color of state law.[196] Both sections then raise the issue of when and under what circumstances a private citizen's actions become so bound up with state action (or are under color of state law) that liability is triggered. Would the very narrow nineteenth century limitations continue, or would some slight expansion occur?

The Civil Rights era again supplied the change in legal thought. Because of its outrageous facts, *United States v. Price*[197] is one of the most important and famous cases to come out of the civil rights movement. Mississippi law enforcement officers, in concert with members of the Ku Klux Klan, kidnapped and murdered three civil rights workers.[198] Their bodies, which had been buried in an earthen dam, were not found until

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192. Monroe v. Pape, 365 U.S. 167, 172 (1961).

193. U.S. CONST. amend. XIV; *see also* United States v. Cruikshank, 92 U.S. 542 (1875).

194. *Cruikshank*, 92 U.S. at 554-55. In *Cruikshank*, the Supreme Court limited the ambit of the Fourteenth Amendment to state actions not involving one citizen against another. *Id.* at 542. The Court also interpreted the equal protection clause similarly in *Virginia v. Rives*, as it stated:

> The provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights.

100 U.S. 313, 318 (1880).

195. *See, e.g.*, Deshaney v. Winnebago Cty. Dep't of Soc. Serv., 489 U.S. 189 (1989).

196. *See supra* Part IV.

197. 383 U.S. 787 (1966).

198. *Id.* at 790.

the F.B.I. paid a bribe to a local white male.[199] National outrage followed these brutal murders. State law enforcement, as it often happened in civil rights crimes of that era in the South, was unable to successfully prosecute.[200] Federal authorities ultimately prosecuted, and convicted the defendants not for murder, but for the violation of the civil rights workers' civil rights under 18 U.S.C. §§ 242 and 241.[201] At that time, a violation of § 242 was a misdemeanor carrying a fine of up to $1,000 and imprisonment for not more than one year or both.[202] Violation of § 241, which prohibited conspiracies, constituted a felony carrying a fine of up to $5,000 or imprisonment of up to 10 years or both.[203] Plainly, the violation of civil rights in that era constituted an inadequate but useful substitute for a state's murder laws. Punishment in serious cases has since been made significantly more severe.[204]

The District Court sustained the misdemeanor indictment under § 242 against the law enforcement officers (who were clearly acting under color of state law as defined in *Monroe*), but dismissed the indictment as to the private citizen participants, holding that their actions were not "under color of law."[205] The Supreme Court reversed the ruling, holding that:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute.

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199. Frederick Dennis Greene, *Cultural Colonization in the Hollywood Film: The Harlem Debates – Part 2*, 5 ASIAN L.J. 63, 84 n.109 (1998); *see also* Clay S. Conrad, Symposium, *Juries: Arbiters or Arbitrary?: Redefining the Role of the Jury: Scapegoating The Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 34 (1997).

200. *See* Conrad, *supra* note 199, at 34.

201. *Price*, 383 U.S. at 791-807.

202. *Id.* at 791.

203. *Id.* at 796.

204. 18 U.S.C. § 242 now provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 (2000). Section 241 grants similar increases in penalties. *See* 18 U.S.C. § 241 (2000) (allowing a maximum penalty of death).

205. *Price*, 383 U.S. at 793.

> To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[206]

The District Court had also dismissed the conspiracy counts under § 241 on the ground that the statute did not include a person's rights under the Fourteenth Amendment.[207] The Supreme Court reversed that as well.[208] The prosecution ultimately resulted in "the first successful jury conviction of white officials and Klansmen in the history of Mississippi for crimes against Negroes and civil rights workers."[209]

Price's facts were so egregious (although hardly unusual for that era where the murder of blacks by whites often went unpunished[210]) that the result seemed unsurprising. As the Court said:

> [T]he brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design. . . . State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. *In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.*[211]

While *Price* was not a § 1983 case—it involved the current criminal counterparts, 18 U.S.C. §§ 241 and 242—its rationale covers § 1983 as well. Section 242 provided criminal penalties for the deprivation of federally protected rights under "color of any law, statute, ordinance, regulation, or custom . . . of any State."[212] *Monroe* had previously held "that under 'color of law' has the same meaning in 18 U.S.C. § 242 as it does in § 1983."[213] Hence, the holding in *Price* is directly relevant to § 1983 litigation. Moreover, *Price* confirmed that the state action requirement of the Fourteenth Amendment and the color of law requirements of 42

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206. *Id.* at 794.

207. *Id.* at 797.

208. *Id.* at 805-06.

209. James P. Turner, *Police Accountability in the Federal System*, 30 McGEORGE L. REV. 991, 1004 (1999) (citing 1967 ATT'Y GEN. ANN. REP. 185).

210. *See, e.g.*, Conrad, *supra* note 199.

211. *Price*, 383 U.S. at 795 (emphasis added).

212. *Id.* at 791.

213. Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 n.9 (1982) (citing Monroe v. Pape, 365 U.S. 167, 185 (1961)).

U.S.C. § 1983 and 18 U.S.C. § 242 are identical.[214] Thus, cases interpreting state action under the Fourteenth Amendment are directly relevant to the color of law requirement under § 1983 and the terms "state actor" or "state action" can be viewed as interchangeable with the phrase "under color of law."

A side-note is worth considering. The officers plainly thought that they would get away with it. The Southern criminal justice system rarely convicted a white person for killing a black person.[215] It is every age's arrogance, when confronted with the atrocities of the past, to reason, "That was then, those sorts of things do not happen now." We should know better than to indulge this perennial conceit. Rodney King's assailants did not expect videotaping and never expected prosecution.[216]

Because *Price's* facts were so exceptionally horrific, it remained to be seen whether private citizens would be held to act under color of state law in less horrific circumstances. The Supreme Court, in another civil rights era case, answered affirmatively. *Adickes v. S.H. Kress & Co.* involved an apparently pretextual arrest under Mississippi's vagrancy laws.[217] Sandra Adickes, a white person, entered Kress' restaurant in the company of six black students, all of whom attended Adickes "Freedom School."[218] The students were offered service but Adickes was refused service on the ground that she was a Caucasian "in the company of Negroes."[219] Upon departing, Adickes was arrested on the charge of vagrancy.[220] Adickes filed a civil rights action under § 1983 alleging a substantive violation of her Equal Protection Clause right not to be discriminated against on the basis of her race, and alleging that the refusal to serve her resulted from a conspiracy between the restaurant and the police.[221] The Supreme Court found that such a conspiracy, if proven, constituted joint activity under *Price* that would make both state actors.[222] Moreover, the Court, in an extended discussion, held that, in order to prove the substantive equal protection violation, Adickes needed only to prove that Kress "refused her service because of a state-enforced custom

214. 383 U.S. at 797-98.

215. Conrad, *supra* note 199, at 10.

216. *See, e.g.*, Turner, *supra* note 209, at 992 (explaining how the justice Department became involved in the case after the state court acquitted the officers); *id.* at 998 (explaining how jury nullification plays a part in racist decision-making from the civil rights cases to Rodney King).

217. 398 U.S. 144, 146 (1970).

218. *Id.* at 146-47.

219. *Id.* at 149.

220. *Id.* at 146.

221. *Id.*

222. *Id.* at 152.

of segregating the races in public restaurants."[223] The case confirmed private citizen exposure to civil rights laws and expanded the notion of which customs have sufficient force of law to constitute state action.

XI. CONCLUSION

It may seem artificial to begin a history with Reconstruction and end it with the Civil Rights Era. However many courts continue to change and construe the Civil Rights Act of 1871. The history of its creation and its massive expansion during the Civil Rights Era remains with us. For that reason, it is crucial to have an understanding of that Act. One cannot fully understand police and correctional officer liability without at least some understanding of that history.

The Act began as an attempt to make the constitutional changes, wrought by Reconstruction, effective. The Compromise of 1877 ended that and sent the statute into, what at the time must have seemed, a permanent retirement. But the seeds of change had been sowed.

Before the 1960's state and local officials were effectively immune from liability for even the worst misconduct. Subject only to regulation by the individual states, flagrant brutality and other outright misconduct was often ignored. The 1961 *Monroe* decision changed the landscape—federal liability, enforceable in a federal court, broadened accountability of state and local officials.

Federal liability for local governmental wrongdoing has revolutionized policing and corrections. It, for what had heretofore been a matter of state law, is, in part, a consequence of application of constitutional rights to criminal procedure and to jails and prisons. Throughout the 1960's the Supreme Court applied more and more of the protections of the Bill of Rights to state criminal prosecutions. Jails and prisons likewise came under constitutional scrutiny. Thus, constitutional restrictions increasingly restrained and regulated discretionary police and corrections officers' conduct. Despite some recent narrowing, these changes continue to regulate official misconduct and will remain important for the foreseeable future.

223. *Id.* at 171.